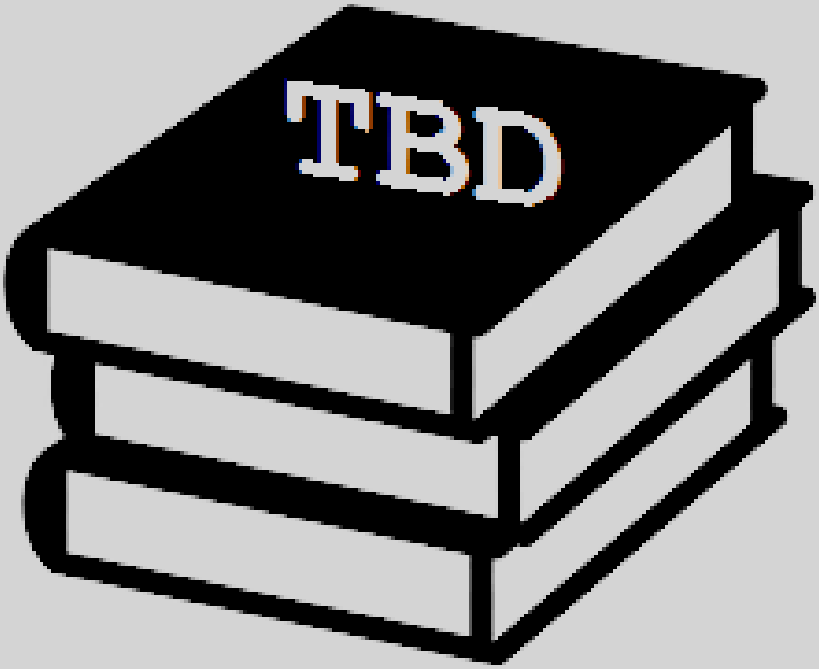

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GOLDEN RULE INSURANCE COMPANY,
Petitioner,

Vs. DOAH Case No: 05-0159RP

DEPARTMENT OF FINANCIAL SERVICES,
OFFICE OF INSURANCE REGULATION,
Respondent.
_____/

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR REHEARING OF PETITIONER'S OBJECTIONS (ETC.) AND PETITIONER'S MOTION TO QUASH

Pursuant to Rule 28-106.204, Petitioner responds to Respondent's "Motion for Rehearing of Petitioner's Objections to Respondent's First Interrogatories and First Production Request and Petitioner's Motion to Quash Same or for Protective Order" (hereafter, the "Rehearing Motion"), and says:

1. The Rehearing Motion lacks merit; it merely re-argues matters already determined by the Administrative Law Judge; and it misstates certain matters.
2. OIR asserts in paragraph 5 of the Rehearing Motion that OIR's quashed discovery "was pursuant to an earlier oral request for expedited discovery which was granted at the same time petitioner Golden Rule's motion for expedited discovery was heard and granted." (Underscoring added.) This assertion is incorrect on both underscored counts.

a. Golden Rule's motion for expedited discovery was not granted by the Division. It was determined to be moot because OIR agreed to produce the materials Golden Rule's motion sought without the need for a ruling.[1]

b. OIR's oral motion was not "granted." It was made. When OIR made the oral motion, the undersigned counsel for Golden Rule represented that, once Golden Rule received OIR's proposed – but unserved - discovery, Golden Rule would apprise the Division of Administrative Hearings by March 21 if Golden Rule objected to the discovery or to OIR's oral motion for expediting responses to it. Golden Rule did so on March 21.

3. OIR asserts in paragraphs 9 and 10 of the Rehearing Motion that the Administrative Law Judge "ruled that OIR's proposed discovery sought improperly to discovery the basis of anticipated rebuttal testimony" and that "the ground upon which the Court ruled was not addressed by Golden Rule's motion." This assertion misstates the record. Golden Rule's Motion to Quash asserted that paragraphs 5 and 6 of OIR's Production request improperly sought opinion work product of Golden Rule's counsel. The Court heard argument and rejected OIR's position.

4. The cases OIR cites in paragraph 10 of the Rehearing Motion are not on point.

a. The case at bar involves no pre-hearing order limiting OIR to particular witnesses or exhibits in the presentation of its case in chief. Golden Rule therefore cannot possibly know what witnesses and documentary evidence OIR may put on when it resumes its case in chief on March 30.

[1] It is likely that OIR so agreed because Golden Rule had also made a public records request of OIR under Chapter 119, Florida Statutes, for these materials, *see* Attachment 1(a true copy thereof), which required OIR to make such records available.

b. Not knowing such information, Golden Rule cannot possibly know what documents it may use to cross examine OIR's remaining, but undisclosed, witnesses, nor what documents it may use in rebuttal to as-yet-unknown OIR evidence.

c. Each of the cases OIR relies upon in paragraph 10 of the Rehearing Motion deal with pre-trial discovery of specifically intended rebuttal or impeachment evidence, in cases where a pre-trial order required disclosure of the evidence, and the party expressly intended to use particular impeachment or rebuttal documentary evidence at trial.

d. Without a prehearing order in this case delimiting OIR's evidence, Golden Rule cannot be expected to now anticipate mid-trial the scope and full thrust of OIR's case in chief. Golden Rule therefore cannot be expected to now determine how it will further cross examine OIR witnesses (since who they are and what they will say are undisclosed), or what documents Golden Rule "intends" to offer in rebuttal, if any. Golden Rule must hear OIR's evidence – the scope and thrust of which has not been delimited by a pre-hearing order or pre-hearing stipulation – before Golden Rule can ascertain whether to present rebuttal evidence and, if so, what rebuttal evidence it may need to offer.

e. None of the cases OIR cites presents this procedural posture. Each is inapposite.

For the foregoing reasons, Golden Rule requests that the Division of Administrative Hearings deny the Rehearing Motion, and grant Golden Rule such other relief as may be appropriate in the premises.

Respectfully submitted,

Daniel C. Brown
Florida Bar Number 0191049

CARLTON FIELDS, P.A.
Post Office Drawer 190
Tallahassee, FL 32302-0190
Telephone: 850.224.1585
Facsimile: 850.222.0398

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by facsimile to James H. Harris and Jamie M. Metz, Assistant General Counsels, Office of Insurance Regulation, 200 East Gaines Street, 612 Larson Building, Room 645A-5, Tallahassee, Florida, 32399-4206 on March 22, 2005.

Daniel C. Brown

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March 14, 2005

Mr. Peter Ashcroft
Document Processing
c/o James Harris
Assistant General Counsel
Office of Insurance Regulation
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

VIA HAND DELIVERY
VIA FACSIMILE

Re: Request to inspect public records

Dear Mr. Ashcroft:

This is a request made pursuant to Chapter 119, Florida Statutes, that the Office of Insurance Regulation ("OIR"), the Department of Financial Services ("DFS") and their organizational units, officers and agents and permit the inspection of certain records.

Definitions of terms used in this request

As used below, the following terms have these meanings:

(a) **"You," "OIR," "DFS,"** and **"your"** mean and refer to the Office of Insurance Regulation of the Florida Department of Financial Services, to the Department of Financial Services, and to OIR's and DFS's attorneys, actuaries, consultants and any other persons or organizations acting on OIR's or DFS's behalf or in concert with OIR or DFS.

(b) **"Pertain(s)(ing) to"** means having any connection, association, or concern with, or any relevance, relation, pertinence, or applicability to, or any implication for or bearing upon the subject of the inquiry.

(c) **"Document,"** means and refers to all originals, and to all copies or reproductions of originals, whether that copy or reproduction is handwritten, printed or otherwise recorded, and includes all written or graphic matter or other

means of preserving thought or expression, and all tangible things from which information can be processed or transcribed.

The documents requested herein include all documents within OIR's and/or possession, custody or control.

(e) **"CMS"** means and refers to the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services.

The records to be inspected

We wish to inspect the following records:

1. Documents pertaining to the 2004 triennial recertification or reapplication of the State of Florida of its intent to provide access to health insurance coverage to its "eligible individuals" in the individual market through an acceptable alternative mechanism pursuant to the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191 ("HIPAA"). *See* 42 U.S.C. §300gg-44 and 45 C.F.R. §148.128. These issues are addressed in a letter dated August 25, 2004 from Ms. Gale P. Arden, Director, Private Health Insurance Group, CMS, to Mr. Kevin M. McCarty, Florida's Director of the Office of Insurance Regulation, a copy of which is Enclosure A to this letter. Ms. Arden states in her letter that she is responding to a letter previously sent to CMS by Mr. McCarty.

2. Documents that were submitted by the State of Florida prior to August 25, 2004 that relate to its HIPAA acceptable alternative mechanism, including but not limited to documents to which Enclosure A responded.

3. Documents pertaining to any communications between CMS and the State of Florida as concerns the following statements in the second paragraph of Exhibit A:

    a. "Furthermore, we have been advised that the State will amend language in the standard small group policy pertaining to accidental dental injury as soon as practically possible, so that the language will no longer constitute a preexisting condition exclusion with regard to HIPAA eligibles."

    b. "The standard small group policy is one of the alternatives that must be offered to HIPAA eligible individuals coming from fully insured group health plans."

4. Any other documents which relate to the State of Florida's 2004 triennial recertification or reapplication to preserve its HIPAA acceptable alternative mechanism.

5. In addition, we request all relevant documents in OIR's and/or DFS's possession pertaining to (1) CMS's implementation of HIPAA, whether directly or on behalf of the State of Florida, (2) any policy form review undertaken by CMS, whether directly or on behalf of the State of Florida, (3) any notice or declaration of CMS's intent to enforce HIPAA, whether directly or on behalf of the State of Florida, and (4) any compliance or enforcement action taken by CMS, whether directly or on behalf of the State of Florida.

Assertion of exemption(s) from inspection requirements

If a responsive record exists, but you assert any exemption from inspection under the Florida Statutes, then, as required by section 119.07(2)(a), Florida Statutes, please delete or excise from the record only that portion of the record with respect to which an exemption has been asserted and validly applies, and produce the remainder of such record for inspection. In this connection, please indicate clearly each redaction in such a record, and as to each such redaction, state in writing and with particularity the reasons for the conclusion that the record, or the redacted portion thereof, is exempt.

If you assert any exemption from inspection, state in writing and with particularity the reasons for the conclusion that the record is exempt or confidential, and state the basis of the exemption asserted, as required by section 119.07(1)(c),(d), Fla. Stat. (2004).

If you assert that the exemption contained in section 119.07(2)(l), Florida Statute applies to all or part of any responsive record, please specify in writing the actual or anticipated party or parties involved or potentially to be involved in any action which serves as your basis for asserting that the record was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings. Also, please redact only such portions of the record which reflect a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and produce the remainder of the record for inspection.

Finally, if you assert any exemption to any responsive record, please produce all remaining records as to which you do not assert an exemption, so that those records may be promptly reviewed without awaiting your redaction efforts in the case of records which you claim to be exempt in whole or in part from inspection.

Responsive records which have been destroyed

If a record or records once possessed by OIR would have been responsive to this request, but the record or records have been disposed of, please produce the document evidencing the consent of the Division of Library and Information Services of the Department of State to such disposition or destruction, as required by section 257.36, Florida Statutes, or explain why such record or records were disposed of without such consent.

Requested schedule for inspection

We wish to inspect the records described above on or before Friday, March 18, 2005. Please advise immediately whether or not OIR / DFS will permit such inspection on or before that date, and inform us where to appear and whom to contact to effectuate such inspection.

We agree to pay reasonable search and reproduction fees. If, however, OIR / DFS believe that complying with this request will require more than ten (10) hours or search time or result in the production of more than 1,000 documents, please contact me at (850) 224-1585.

If OIR will not allow inspection of the responsive records on or before March 18, 2005, please so advise us immediately.

Thank you for your assistance with this request. Should you have any question in this regard, please contact me at the above address or telephone number.

Very truly yours,

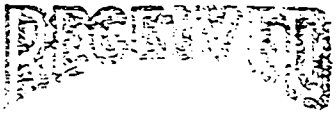
Daniel C. Brown

DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services

7500 Security Boulevard
Baltimore, MD 21244-1850

AUG 25 2004



AUG 26 2004

Bureau of Life & Health
Forms & Rates

Kevin M. McCarty, Director
Office of Insurance Regulation
200 East Gaines Street
Tallahassee, Florida 32399

Dear Director McCarty:

Thank you for your letter indicating that Florida intends to continue to provide access to health coverage to its HIPAA eligibles through its alternative mechanism. Section 2744(b)(1)(C) of title XXVII of the Public Health Service (PHS) Act requires that, every three years, States provide the Centers for Medicare & Medicaid Services with information necessary to review their alternative mechanisms. The purpose of these continuing submissions of information is to preserve the presumption that the mechanism is acceptable.

My staff has reviewed the material Florida submitted. It is our understanding that the State views each insurer's two most popular products available to certain HIPAA eligible individuals (those coming from self-insured group health plans) as meeting its standards for comprehensive coverage in the individual market. Furthermore, we have been advised that the State will amend language in the standard small group policy pertaining to accidental dental injury as soon as practically possible, so that the language will no longer constitute a preexisting condition exclusion with regard to HIPAA eligibles. The standard small group policy is one of the alternatives that must be offered to HIPAA eligible individuals coming from fully insured group health plans.

Accordingly, my staff advises me that they have found no basis for disapproval of your alternative mechanism. If you have any questions regarding this letter, please contact Joan Kral at 410-786-9539.

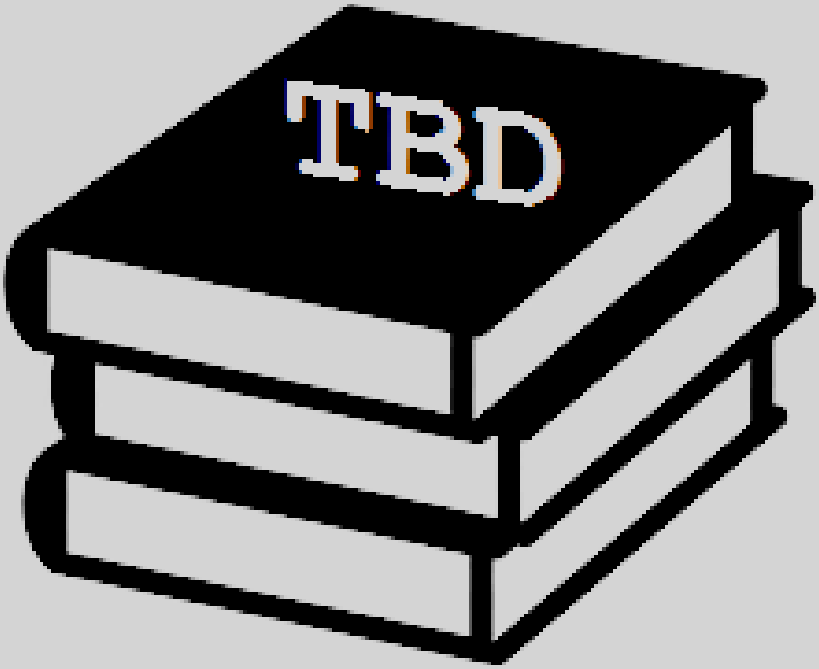
Sincerely,

Gale P. Arden

Gale P. Arden
Director
Private Health Insurance Group

cc: The Honorable Jeb Bush
Richard Robleto

EXHIBIT A



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